

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

VERNON TICE, on behalf of himself )  
and all others similarly situated, )  
 )  
Plaintiff, )

vs. )

Case No. 04-0330-CV-W-ODS

NOVASTAR FINANCIAL, INC., et al., )  
 )  
Defendants. )

EAST SIDE INVESTORS, individually )  
and on behalf of all others similarly )  
situated, )  
 )  
Plaintiff, )

vs. )

Case No. 04-0334-CV-W-ODS

NOVASTAR FINANCIAL, INC., et al., )  
 )  
Defendants. )

EVELYN GREENBERG, individually )  
and on behalf of all others similarly )  
situated, )  
Plaintiff, )

vs. )

Case No. 04-0335-CV-W-ODS

NOVASTAR FINANCIAL, INC., et al., )  
 )  
Defendants. )

TODD LESH, individually and on behalf )  
of all others similarly situated, )  
 )  
Plaintiff, )

vs. )

Case No. 04-0337-CV-W-ODS

NOVASTAR FINANCIAL, INC., )  
 )  
 )

Defendants.	)	
GEOFFREY DEMIS, individually and	)	
on behalf of all others similarly situated,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 04-0338-CV-W-ODS
	)	
NOVASTAR FINANCIAL, INC., et al.,	)	
	)	
Defendants.	)	
PATRICIA RUSSELL-CUNNINGHAM,	)	
individually and on behalf of all others	)	
similarly situated,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 04-0345-CV-W-ODS
	)	
NOVASTAR FINANCIAL, INC., et al.,	)	
	)	
Defendants.	)	
STANLEY ROBERTS, individually and	)	
on behalf of all others similarly situated,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 04-0346-CV-W-ODS
	)	
NOVASTAR FINANCIAL, INC., et al.,	)	
	)	
Defendants.	)	
JERRY MARKOVITZ, on behalf of	)	
himself and all others similarly situated,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 04-0362-CV-W-ODS
	)	
NOVASTAR FINANCIAL, INC., et al.,	)	
	)	
Defendants.	)	

PHILIP M. TINEGA, individually and on )  
behalf of all others similarly situated, )

Plaintiff, )

vs. )

NOVASTAR FINANCIAL, INC., et al., )

Defendants. )

Case No. 04-0371-CV-W-ODS

JEANNE FRANCK, on behalf of herself )  
and all others similarly situated, )

Plaintiff, )

vs. )

NOVASTAR FINANCIAL, INC., et al., )

Defendants. )

Case No. 04-0386-CV-W-ODS

MILTON PFEIFFER, individually and on )  
behalf of all others similarly situated, )

Plaintiff, )

vs. )

NOVASTAR FINANCIAL, INC., et al., )

Defendants. )

Case No. 04-0387-CV-W-ODS

THEODORE GERSTEL, on behalf of )  
himself and all others similarly situated, )

Plaintiff, )

vs. )

NOVASTAR FINANCIAL, INC., et al., )

Defendants. )

Case No. 04-0390-CV-W-ODS

SIDNEY FIELDEN and CINDY )

HENZEL, individually and on behalf of  
all others similarly situated,

Plaintiff,

vs.

NOVASTAR FINANCIAL, INC., et al.,

Defendants.

Case No. 04-0404-CV-W-ODS

IRIS FRIEDMAN, on behalf of herself  
and all others similarly situated,

Plaintiff,

vs.

NOVASTAR FINANCIAL, INC., et al.,

Defendants.

Case No. 04-0425-CV-W-ODS

WILLIAM P. ALLMAN, individually and  
on behalf of all others similarly situated,

Plaintiff,

vs.

NOVASTAR FINANCIAL, INC., et al.,

Defendants.

Case No. 04-0430-CV-W-ODS

ANDREW GLICK, on behalf of himself  
and all others similarly situated,

Plaintiff,

vs.

NOVASTAR FINANCIAL, INC., et al.,

Defendants.

Case No. 04-0440-CV-W-ODS

DOROTHY JEAN DONAHUE, on

behalf of herself and all others similarly  
situated, )

Plaintiff, )

vs. )

NOVASTAR FINANCIAL, INC., et al., )

Defendants. )

Case No. 04-0441-CV-W-ODS

ROSALIND BRUCKMAN, on behalf of  
herself and all others similarly situated, )

Plaintiff, )

vs. )

NOVASTAR FINANCIAL, INC., et al., )

Defendants. )

Case No. 04-0508-CV-W-ODS

ORDER (1) GRANTING MOTIONS TO CONSOLIDATE;  
(2) GRANTING GENERIC TRADING'S AND HAROLD & WILMA DANIELS'  
MOTION TO APPOINT LEAD PLAINTIFF;  
(3) GRANTING GENERIC TRADING'S AND HAROLD & WILMA DANIELS'  
MOTION FOR APPROVAL OF SELECTION OF LEAD COUNSEL; AND  
(4) DENYING ALL OTHER PENDING MOTIONS IN THE  
ABOVE-CAPTIONED CASES

In these putative class action cases, alleging various violations of the Securities Exchange Act, the parties have filed multiple motions for consolidation, appointment of lead plaintiff(s), and approval of selection of lead plaintiff's counsel. The Court's ruling follows.

## **I. BACKGROUND**

The eighteen above-captioned actions were brought against Defendants NovaStar Financial, Inc. ("NovaStar"), a speciality finance company that originates, invests in and services residential nonconforming loans, and certain NovaStar officers

and directors, seeking damages for violations of the Securities Exchange Act of 1934. Plaintiffs, who are purchasers of NovaStar common stock, allege that between on or about October 29, 2003, and on or about April 8, 2004 (the “class period”),<sup>1</sup> Defendants knew but concealed from the investing public the following information: (1) the company’s growth through branch office expansions was overstated because the offices were illegally conducting business; (2) the company’s projected growth would be thwarted once regulators unearthed Defendants’ unlawful business; and (3) the company exaggerated the number of branches in existence. Plaintiffs further allege that due to Defendants’ false statements, NovaStar’s stock price traded at inflated levels, increasing to as high as \$67.00 per share on March 22, 2004, whereby NovaStar sold more than \$107 million to the unsuspecting public. Compl. ¶¶ 1-4.<sup>2</sup>

## II. MOTIONS TO CONSOLIDATE

The Private Securities Litigation Reform Act (“PSLRA”) requires the Court to address outstanding motions to consolidate before appointing lead plaintiff(s). 15 U.S.C. § 78u-4(a)(3)(B)(ii) (1997). Plaintiffs Cassel Group, Generic Trading of Philadelphia, Giunta Group, Greenberg Group, Krishnaiah Group, Market Street Securities, Ostein Group and Schottland Group have moved to consolidate all pending

---

<sup>1</sup> The Franck, Pfeiffer, Gerstel, Fielden, Friedman, Glick, Donahue and Bruckman actions allege the same class period as Tice. However, the Lesh and Allman actions allege the class period runs from October 29, 2003 to April 9, 2004; the East Side Investors action alleges the class period runs from October 29, 2003 to April 11, 2004; the Demis and Russell-Cunningham actions allege the class period runs from October 29, 2003 to April 12, 2004; the Markovitz action alleges the class period runs from October 29, 2003 to April 20, 2004; the Tinega action alleges the class period runs from November 3, 2003 to April 19, 2004; and the Greenberg and Roberts actions allege the class period runs from November 11, 2003 to April 12, 2004. The discrepancies in the class period will be resolved with the filing of an amended complaint as discussed infra.

<sup>2</sup> Unless otherwise noted, all references to the Complaint pertain to the Complaint filed by Plaintiff Tice (Case No. 04-0330-CV-W-ODS). In all pertinent respects, however, all the Complaints are similar.

shareholder actions against NovaStar with the lead Case No. 04-0330-CV-W-ODS. Defendants have also filed a Motion to Consolidate, and the non-moving Plaintiffs have not opposed these motions.

All of the cases against NovaStar share both factual and legal issues, and consolidation of these cases will prevent needless expense and delay. Therefore, consolidation is appropriate under Rule 42(a) of the Federal Rules of Civil Procedure. The other pending shareholder actions against NovaStar (Case Nos. 04-0334-CV-W-ODS, 04-0335-CV-W-ODS, 04-0337-CV-W-ODS, 04-0338-CV-W-ODS, 04-0345-CV-W-ODS, 04-0346-CV-W-ODS, 04-0362-CV-W-ODS, 04-0371-CV-W-ODS, 04-0386-CV-W-ODS, 04-0387-CV-W-ODS, 04-0390-CV-W-ODS, 04-0404-CV-W-ODS, 04-0425-CV-W-ODS, 04-0430-CV-W-ODS, 04-0440-CV-W-ODS, 04-0441-CV-W-ODS and 04-0508-CV-W-ODS) shall be consolidated with Lead Case No. 04-0330-CV-W-ODS, which will be re-captioned as “In re NovaStar Financial, Inc. Securities Litigation.”

### **III. APPOINTMENT OF LEAD PLAINTIFF**

The Court has received multiple Motions for Appointment as Lead Plaintiff. In addition, the Court deems the filing of a Complaint in any action filed subsequent to the first case filed as a Motion for Appointment as Lead Plaintiff(s) unless the plaintiff(s) filed a separate Motion for Appointment as Lead Plaintiff. Under the PSLRA, the Court shall appoint as lead plaintiff(s), the member or members of the class that it “determines to be most capable of adequately representing the interests of the class members. . . .” 15 U.S.C. § 78u-4(a)(3)(B). The most adequate plaintiff is the person or group of persons that has complied with the following requirements:

- (1) Publish, in a widely circulated national business-oriented publication, a notice advising members of the purported plaintiff class of the pending action;
- (2) Has the largest financial interest in the relief sought by the class; and
- (3) Otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. §§ 78u-4(a)(3)(A), 78u-4(a)(3)(B)(iii).

#### A. Notification Requirement

In this case, the notification requirement has been met. The Tice action was the initial case filed. Pursuant to 15 U.S.C. § 78u-4(a)(3)(A), Plaintiff Tice published the notice of pendency of the instant action in Business Wire on April 13, 2004. See Doc. # 9, Ex. A. The notice informed members of the proposed class of their right to file a motion to serve as lead plaintiff(s) with the Court no later than sixty days from the date of publication. “The Business Wire has consistently been recognized as a suitable vehicle for meeting the PSLRA’s statutory requirement that notice be published ‘in a widely circulated national business-oriented publication or wire services.’” In re Universal Access, Inc. Sec. Litig., 209 F.R.D. 379, 383 (E.D. Tex. 2002) (citations omitted); In re USEC Sec. Litig., 168 F. Supp.2d 560, 562 (D. Md. 2001). The time period in which the class members could file a motion for appointment as lead plaintiff(s) expired on June 14, 2004, therefore, all motions for appointment as lead plaintiff(s) filed on or before this date were timely filed.

#### B. Largest Financial Interest Requirement

When it enacted PSLRA, “Congress sought to create mechanisms to ensure the protection of class members’ interests in securities litigation that was widely perceived as being lawyer-instituted and lawyer-driven.” In re BankAmerica Corp. Sec. Litig., 350 F.3d 747, 751 (8th Cir. 2003) (citing In re Cendant Corp. Litig., 264 F.3d 201, 254-68 (3d Cir. 2001)). The PSLRA provides this protection by requiring the Court to appoint a lead plaintiff or group of lead plaintiffs in accordance with the statute.

The movant(s) with the largest financial interest is presumptively the lead plaintiff(s). 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). This presumption may be rebutted by a showing that the presumptive lead plaintiff(s): (1) will not fairly and adequately protect the interests of the class, or (2) is subject to unique defenses that render such plaintiff incapable of adequately representing the class. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).



*(1) Closing Date of the Class Period*

As previously noted, the competing lead plaintiffs assert different opening and closing dates for the class period. The opening date for the class period will be resolved with the filing of a consolidated complaint; however, the closing date for the class period greatly affects the calculation of the largest financial interest.

In determining the termination of the class period, the court believes that the appropriate test is that “liability under the securities acts is terminated when curative information is publicly announced or otherwise effectively disseminated.” In essence, that test is a preliminary merits determination whether the facts which underlie the gravamen of the plaintiff's complaint continue to represent a reasonable basis on which an individual purchaser or the market would rely.

In re Data Access Sys. Sec. Litig., 103 F.R.D. 130, 143 (D. N.J., 1984) (quoting McFarland v. Memorex Corp., 96 F.R.D. 357, 364 (N.D. Cal. 1982)).

Most Plaintiffs plead on or before April 11, 2004, as the closing date for the class. Before the market opened on April 12, 2004, THE WALL STREET JOURNAL reported that NovaStar was ordered to cease operations in the State of Nevada after state authorities discovered that none of the Nevada branches were licensed to conduct business in the state. Jonathan Weil, Tracking the Numbers / Outside Audit: NovaStar's Rise Has Ring of Deja Vu; Lender's Licensing Woes in Nevada, Other States May Flag Larger Concerns, WALL ST. J., Apr. 12, 2004, at C3. The article also stated that most of the fifteen branches that NovaStar claimed to have in Nevada did not actually exist. Id. The last day for trading prior to the article's publication took place on Thursday, April 8, 2004, because the stock market was closed on Friday, April 9, 2004, in observance of Good Friday. Prior to the publication, NovaStar's stock closed at \$54.18; however, the stock closed at \$37.50 on April 12, 2004.

Other movants contend the closing date for the class period should be late as April 20, 2004. On April 20, 2004, THE WALL STREET JOURNAL stated that NovaStar was the subject of an informal inquiry by the Securities and Exchange Commission. NovaStar Notified of SEC Inquiry, WALL ST. J., Apr. 20, 2004, at C3. The stock's price dropped again from \$39.01 to \$31.80. These movants claim that the article that was

printed on April 12, 2004, was only a partial corrective disclosure.

When a court considers whether a corrective disclosure is sufficient to terminate a class period, it must determine if there is “a substantial question of fact as to whether the release had cured the market. . . .” Friedlander v. Barnes, 104 F.R.D. 417, 421 (S.D.N.Y. 1984); see also Sherin v. Gould, 115 F.R.D. 171, 174 (E.D. Pa. 1987). Following the April 12, 2004, THE WALL STREET JOURNAL article, the price for the stock fell over thirty percent, putting judicious investors on notice that further inquiry into the cause of the drop would be appropriate. The rapidity and magnitude of the fall suggests that many prudent investors did that very thing. The Court finds that the article published by THE WALL STREET JOURNAL on April 12, 2004, cured the market; thus, it served as corrective disclosure of fraud. Therefore, the class period shall close on April 8, 2004.

## *(2) Largest Financial Interest*

The PSLRA does not articulate the procedure for determining the largest financial interest among the competing movants. However, a four-factor inquiry has been recognized or adopted by various courts. See In re Enron Corp. Sec. Litig., 206 F.R.D. 427, 440 (S.D. Tex. 2002); In re Olsten Corp. Sec. Litig., 3 F. Supp.2d 286, 295 (E.D.N.Y. 1998); In re Nice Sec. Litig., 188 F.R.D. 206, 217 (D. N.J. 1998). The four factors are: (1) the number of shares purchased; (2) the number of net shares purchased; (3) the total net funds expended by the plaintiffs during the class period; and (4) the approximate losses suffered by the plaintiffs. Enron Corp. Sec. Litig., 206 F.R.D. at 440.

The Court has reviewed the competing motions for appointment of Lead Plaintiff along with the voluminous suggestions and exhibits. Nine groups have a substantially greater financial interest in this litigation. A brief description of each group, along with the alleged loss suffered, is set forth below:

- A. Market Street Securities, which is considered a “market maker,” alleges it suffered a loss of \$1.3 million.

- B. Generic Trading of Philadelphia (“Generic Trading”),<sup>3</sup> an institutional investor that day trades, alleges a loss of slightly more than \$2 million, with a class closing date of April 20, 2004. Applying the relevant class period as set forth supra, Generic Trading estimated loss is more than \$1 million.
- C. Harold and Wilma Daniels’ loss is approximately \$412,616.
- D. The Cassel Group, which consists of three individuals,<sup>4</sup> claims a loss of \$349,449.
- E. The Giunta Group, which consists of four investors, contends it has an estimated loss of \$1.5 million. However, the Giunta Group’s loss is largely a result of the stocks purchased by Benjamin Giunta on April 12, 2004.<sup>5</sup> Applying the relevant class period, the Giunta Group suffered an estimated loss of \$276,588.

---

<sup>3</sup> Generic Trading and Harold and Wilma Daniels filed a motion seeking appointment as lead plaintiffs, but they do not explain how they are related to one another other than their investments in NovaStar. While the PSLRA contemplates the appointment as a person or “group of persons” as lead plaintiff, it does not define “group.” Nevertheless, most courts have determined that the appointment of a group of unrelated plaintiffs is not appropriate under the PSLRA. See In re Conseco, Inc. Sec. Litig., 120 F. Supp.2d 729, 733 (S.D. Ind. 2000); In re Texlon Corp. Sec. Litig., 67 F. Supp.2d 803, 816 (N.D. Ohio 1999); In re Donnkenny Inc. Sec. Litig., 171 F.R.D. 156, 157-58 (S.D.N.Y. 1997). The Court agrees with the reasoning of these courts and concludes that granting a request to appoint an unrelated group of investors would violate the purposes behind the PSLRA, which includes the prevention of lawyer-driven litigation. Therefore, the Court will consider Generic Trading and Harold and Wilma Daniels’ requests separately.

<sup>4</sup> The record does not clearly establish whether the individuals are related within the Cassel Group, Giunta Group, Ostien Group Schottland Group, Greenberg Group and Krishnaiah Group. However, it is unnecessary for the Court to break down each group into its related parts because the alleged aggregate loss suffered by each group is less than the loss suffered by Harold and Wilma Daniels.

<sup>5</sup> Benjamin Giunta purchased a large quantity of NovaStar stock as the price dropped during the course of trading on April 12, 2004. Thus, he suffered losses from that day’s trading, but the purchases were made as and after the market responded to the corrective disclosure.

- F. The Ostien Group consists of three individuals who claim a loss of \$242,309.
- G. The Schottland Group is made up of four investors who allege a loss of \$238,000.
- H. The Greenberg Group is made up of eight individuals, claiming a loss of \$237,186.
- I. The Krishnaiah Group consists of two individuals, alleging a loss of \$155,047.40 during the appropriate class period.

Based on this information, Market Street Securities has the largest financial interest and, therefore, is presumptively the lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). However, this presumption may be rebutted by a showing that the presumptive lead plaintiff: (1) will not fairly and adequately protect the interests of the class, or (2) it is subject to unique defenses that render them incapable of adequately representing the class. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). Because these factors are intertwined with the requirements of Rule 23, which must also be met by the lead plaintiff(s), the Court will discuss these issues together in the subsequent section.

### C. Rule 23 Requirements

The PSLRA also requires that the lead plaintiffs satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure, which provides:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). At this stage, all movants for appointment as lead plaintiff have sufficiently demonstrated the numerosity requirement. Likewise, the commonality requirement has been satisfied because all the movants share common questions of

both law and fact.

The lead plaintiff “must make at least a preliminary showing that it has claims that are typical to the putative class and has the capacity to provide adequate representation for those class members.” Enron Corp. Sec. Litig., 206 F.R.D. at 441 (citations omitted). However, “[a] proposed class representative is not adequate or typical if it is subject to a unique defense that threatens to play a major role in the litigation.” In re Milk Prods. Antitrust Litig., 195 F.3d 430, 437 (8th Cir. 1999) (citations omitted); see also In re Safeguard Scientifics, 216 F.R.D. 577, 581-82 (E.D. Pa. 2003) (citations omitted). Typicality assesses “whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees’ interests will be fairly represented.” Safeguard Scientifics, 216 F.R.D. at 581. “Adequate representation requires a finding that the purported class representative and its attorney are capable of pursuing the litigation and that neither has a conflict of interest with other class members.” In re Cree, Inc. Sec. Litig., 219 F.R.D. 369, 372 (M.D. N.C. 2003) (citing Sosna v. Iowa, 419 U.S. 393, 403 (1975)).

Competing movants argue that Market Street Securities does not meet the typicality and adequacy requirements because it is a market maker. A market maker “is a dealer who either regularly publishes bid and ask quotations in an interdealer system or furnishes such quotations on request, and who is ‘ready, willing, and able’ to trade reasonable quantities of the security in which he is making a market to other dealers at his quoted prices.” McNichols v. Loeb Rhoades & Co., Inc., 97 F.R.D. 331, 344 (N.D. Ill. 1982). Courts have found market makers to be atypical of a class because they are subject to unique defenses regarding their reliance, or lack thereof, on the alleged fraud. See e.g., Queen Uno Ltd. P’ship v. Coeur D’Alene Mines Corp., 183 F.R.D. 687, 692 (D. Colo. 1998); McNichols v. Loeb Rhoades & Co., 97 F.R.D. 331, 346 (N.D. Ill. 1982). The existence of an arguable defense based on Market Street Securities’ lack of reliance on the fraud convinces this Court that a market maker’s interests are different than individuals’ and institutional investors’ interests and, therefore, does not satisfy the typicality requirement.

Generic Trading, which has the second largest financial interest, is an institutional investor and, it is argued, may have unique defenses thus making it atypical of the putative class. The PSLRA does not expressly prohibit institutional investors from serving as lead plaintiff; however, courts have split with regard to whether an institutional investor may serve as lead plaintiff<sup>6</sup>, and other courts have appointed an institutional investor along with a non-institutional investor as co-lead plaintiffs.<sup>7</sup> Nevertheless, Congress has expressed a preference for appointing institutional investors as lead plaintiff.

The Conference Committee seeks to increase the likelihood that institutional investors will serve as lead plaintiffs by requiring courts to presume that the member of the purported class with the largest financial stake in the relief sought is the “most adequate plaintiff.” The Conference Committee believes that increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions. Institutional investors are America's largest shareholders, with about \$9.5 trillion in assets, accounting for 51% of the equity market. . . . Institutional investors and other class members with large amounts at stake will represent the interests of the plaintiff class more effectively than class members with small amounts at stake. The claims of both types of class members generally will be typical.

H.R. Conf. Rep. No. 104-369, at 34 (1995). The Court is mindful that legislative history

---

<sup>6</sup> Compare In re Cree, Inc. Sec. Litig., 219 F.R.D. at 372 (appointing institutional investor as lead plaintiff); and In re Bank One Shareholders Class Actions, 96 F. Supp.2d 780, 784 (N.D. Ill. 2000) (rejecting institutional lead plaintiff movant that engaged in extensive day trading), with In re Safeguard Scientifics, 216 F.R.D. at 582-83 (rejecting day trader as lead plaintiff). For a more thorough review of this issue, see R. Chris Heck, Conflict and Aggregation: Appointing Institutional Investors as Sole Lead Plaintiffs Under the PSLRA, 66 U. Chi. L. Rev. 1199 (1999).

<sup>7</sup> See Yousefi v. Lockheed Martin Corp., 70 F. Supp.2d 1061, 1070-71 (C.D. Cal. 1999) (appointing an individual investor and an institutional investor as lead plaintiffs); In re Oxford Health Plans, Inc., 182 F.R.D. 42, 29 (S.D.N.Y. 1998) (stating that naming an institution and individual lead plaintiffs “allows for broad representation and the sharing of resources and experience to ensure that litigation will proceed expeditiously. . . and will assure the court that any settlement when proposed will be provident.”).

is not a conclusive determinant of Congressional intent. However, the history succinctly encapsulates one of the PSLRA's purposes; namely, insuring that securities litigation is "driven" by a plaintiff with sufficient financial stake to pursue claims on behalf of the class with the vigor necessary to protect all investors and to prevent "professional" plaintiffs who own a relatively small number of shares from controlling the suit. The investor with the largest stake will frequently be an institutional investor, and there is no principled reason for excluding them from consideration simply because of their institutional status. See e.g., Sofran v. Labranche & Co, Inc., 220 F.R.D. 398, 402 (S.D.N.Y. 2004) (appointing institutional investor as lead plaintiff and recognizing Congress' preference for appointment of institutional investors).

In addition, competing movants argue that Generic Trading is atypical because its purchases were not made in reliance on Defendants' fraudulent statements. However, in a securities class action, reliance is presumed pursuant to the fraud-on-the-market theory, which assumes that all publicly available information about the company is reflected in its stock price. In re Control Data Corp. Sec. Litig., 933 F.2d 616, 619-20 (8th Cir. 1991); In re BankAmerica Corp. Sec. Litig., 78 F. Supp.2d 976, 991 (E.D. Mo. 1999). Thus, it makes no difference whether the decision to purchase or sell the stock was based on the purchaser or seller receiving all of the allegedly false information, some of it, or even none at all. Therefore, the Court finds that Generic Trading has satisfied the requirements of Rule 23.

To reconcile the minor factual differences between Generic Trading and non-institutional investors, Harold and Wilma Daniels ("the Daniels") are hereby appointed as co-lead plaintiffs.<sup>8</sup> The PLSRA permits the appointment of more than one person or entity as lead plaintiff. See 15 U.S.C. 78u-4(a)(3)(B)(i) (directing the Court to "appoint as lead plaintiff *the member or members* of the purported plaintiff class that the court

---

<sup>8</sup> See In re Oxford Health Plans, Inc. Sec. Litig., 182 F.R.D. 42, 47-49 (S.D.N.Y. 1998) (stating that "[a]llowing for diverse representation, including. . . significant individual investors and a large institutional investor, ensures that the interests of all class members will be adequately represented in the prosecution of the action and in the negotiation and approval of a fair settlement, and that the settlement process will not be distorted by the differing aims of differently situated claimants.").

determines to be the most capable of adequately representing the interests of the class.”) (emphasis added). In addition to being the non-institutional investors with the largest financial interest, the Daniels meet the requirements of Rule 23. Appointing co-lead plaintiffs will ensure a broader, more diverse representation of the class, thereby protecting the various interests of its members.

#### **IV. APPROVAL OF CLASS COUNSEL**

Pursuant to PSLRA, once the most adequate plaintiffs are selected, the “most adequate plaintiff[s] shall, subject to the approval of the court, select and retain counsel to represent the class.” 15 U.S.C. § 78u-4(a)(3)(B)(v). Lead Plaintiffs seek approval of their selection of the law firms of Entwistle & Cappucci and Milberg Weiss Bershad & Schulman, L.L.P. (“Milberg Weiss”), to serve as lead counsel, and the law firm of Walters Bender Strohbehn & Vaughan, P.C., to serve as liaison counsel.

The Court must first inquire into the appropriateness of appointing more than one firm. See Vincelli v. Nat’l Home Health Care Corp., 112 F. Supp.2d 1309, 1305 (M.D. Fla. 2000) (citing In re Party City Sec. Litig., 189 F.R.D. 91, 114 (D. N.J. 1999)). The PSLRA does not expressly prohibit the lead plaintiffs from selecting more than one law firm to represent the class. 15 U.S.C. § 78u-4(a)(3). Given the scope and complexity of a securities class action, the Court finds two firms are appropriate in this case and the choice to appoint liaison counsel is also appropriate.<sup>9</sup>

Next, the Court must evaluate the effectiveness of the proposed class counsel in order to protect the class. Id. Upon review of the firm résumés, it appears that both Entwistle & Cappucci and Milberg Weiss have significant experience litigating securities class actions. The firms have served lead counsel, co-lead counsel or a member of the

---

<sup>9</sup> However, the Court is concerned with duplicative services occurring; therefore, any request for attorneys’ fees will be carefully evaluated to ensure that the firms’ services are not duplicative of one another.



executive committee in more than sixty-five securities fraud class actions. In addition, both firms employ several qualified attorneys and possess ample resources to effectively manage the class litigation and protect the class's interests. Thus, Entwistle & Cappucci and Milberg Weiss are appointed co-lead counsel for the Plaintiff Class.

Lead Plaintiffs also request the Court approve the law firm of Walters Bender Strohbehn & Vaughan, P.C., to serve as liaison counsel. Assuming that Lead Plaintiffs are requesting the approval of their choice of "local" counsel, the Court finds such approval unnecessary. Lead Plaintiffs are free to choose whomever they wish to represent them locally. Therefore, this request is denied as moot.

## **V. CONCLUSION**

For the foregoing reasons, IT IS HEREBY ORDERED:

- (1) In Tice v. NovaStar Financial, Inc., Case No. 04-0330:
  - (A) Ostien Group's Motion to Consolidate (Doc. # 13) is GRANTED;
  - (B) Ostien Group's Motion to Appoint as Lead Plaintiffs and for Approval of its Selection of Lead Counsel (Doc. # 15) is DENIED;
  - (C) Giunta Group's Motion to Consolidate and Motion to Appoint as Lead Plaintiffs and for Approval of its Selection of Co-Lead Counsel (Doc. # 17) is GRANTED IN PART and DENIED IN PART;
  - (D) Cassel Group's Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Selection of Lead Counsel (Doc. # 21) is GRANTED IN PART and DENIED IN PART;
  - (E) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Choice of Counsel (Doc. # 25) is GRANTED IN PART and DENIED IN PART;
  - (F) Generic Trading of Philadelphia's Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Selection of Lead Counsel (Doc. # 28) is GRANTED;
  - (G) Greenberg's Motion to Consolidate, for Appointment as Lead Plaintiff and

for Approval of Counsel (Doc. # 34) is GRANTED IN PART and DENIED IN PART; and

- (H) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Defendants' Obligation to Respond to Individual Complaints (Doc. # 61) is GRANTED.

(2) In East Side Investors v. NovaStar Financial Inc., Case No. 04-0334:

- (A) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 8) is GRANTED IN PART and DENIED IN PART;
- (B) Generic Trading of Philadelphia's Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Selection of Lead Counsel (Doc. # 10) is GRANTED; and
- (C) Generic Trading of Philadelphia's Motion for Entry of Default (Doc. # 26) is DENIED;
- (D) Defendants' Motion for Extension of Time to Respond to Motion for Entry of Default (Doc. # 34) is DENIED AS MOOT;
- (E) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 35) is GRANTED; and
- (D) Motion of Generic Trading of Philadelphia to Approve Retroactively the Filing of Memorandum in Excess of Page Limitations (Doc. # 37) is GRANTED.

(3) In Greenberg v. NovaStar Financial, Inc., Case No. 04-0335:

- (A) Greenberg's Motion for Appointment as Lead Plaintiff and for Approval of Counsel (Doc. # 4) is DENIED;
- (B) Market Street Securities' Motion to Consolidate, for Appointment as Lead

- Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 8) is GRANTED IN PART and DENIED IN PART;
- (C) Greenberg Group's Amended Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Counsel (Doc. # 11) is GRANTED IN PART and DENIED IN PART;
  - (D) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 24) is GRANTED; and
  - (E) Motion of Generic Trading of Philadelphia to Approve Retroactively the Filing of Memorandum in Excess of Page Limitations (Doc. # 26) is GRANTED.
- (4) In Lesh v. NovaStar Financial, Inc., Case No. 04-0337:
- (A) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 8) is GRANTED IN PART and DENIED IN PART;
  - (B) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 21) is GRANTED; and
  - (C) Motion of Generic Trading of Philadelphia to Approve Retroactively the Filing of Memorandum in Excess of Page Limitations (Doc. # 23) is GRANTED.
- (5) In Demis v. NovaStar Financial, Inc., Case No. 04-0338:
- (A) Schottland Group's Motion to Consolidate, for Appointment of Lead Plaintiff and Selection of Lead and Liaison Counsel (Doc. # 10) is GRANTED IN PART and DENIED IN PART;
  - (B) Market Street Securities' Motion to Consolidate, for Appointment as Lead

Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 13) is GRANTED IN PART and DENIED IN PART;

- (C) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 26) is GRANTED; and
- (D) Motion of Generic Trading of Philadelphia to Approve Retroactively the Filing of Memorandum in Excess of Page Limitations (Doc. # 28) is GRANTED.

(6) In Russell-Cunningham v. NovaStar Financial, Inc., Case No. 04-0345:

- (A) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 5) is GRANTED IN PART and DENIED IN PART;
- (B) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 18) is GRANTED; and
- (C) Motion of Generic Trading of Philadelphia to Approve Retroactively the Filing of Memorandum in Excess of Page Limitations (Doc. # 20) is GRANTED.

(7) In Roberts v. NovaStar Financial, Inc., Case No. 04-0346:

- (A) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 6) is GRANTED IN PART and DENIED IN PART; and
- (B) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 15) is GRANTED.

- (8) In Markovitz v. NovaStar Financial, Inc., Case No. 04-0362:
- (A) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 9) is GRANTED IN PART and DENIED IN PART;
  - (B) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 22) is GRANTED; and
  - (C) Motion of Generic Trading of Philadelphia to Approve Retroactively the Filing of Memorandum in Excess of Page Limitations (Doc. # 24) is GRANTED.
- (9) In Tinega v. NovaStar Financial Inc., Case No. 04-0371:
- (A) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 5) is GRANTED IN PART and DENIED IN PART;
  - (B) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 22) is GRANTED; and
  - (C) Motion of Generic Trading of Philadelphia to Approve Retroactively the Filing of Memorandum in Excess of Page Limitations (Doc. # 24) is GRANTED.
- (10) In Franck v. NovaStar Financial Inc., Case No. 04-0386:
- (A) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 11) is GRANTED IN PART and DENIED IN PART;
  - (B) Defendants' Motion to Consolidate and for Order Requiring Filing of

Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 24) is GRANTED; and

- (C) Motion of Generic Trading of Philadelphia to Approve Retroactively the Filing of Memorandum in Excess of Page Limitations (Doc. # 26) is GRANTED.

(11) In Pfeiffer v. NovaStar Financial, Inc., Case No. 04-0387:

- (A) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 5) is GRANTED IN PART and DENIED IN PART;
- (B) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 18) is GRANTED; and
- (C) Motion of Generic Trading of Philadelphia to Approve Retroactively the Filing of Memorandum in Excess of Page Limitations (Doc. # 20).

(12) In Gerstel v. NovaStar Financial, Inc., Case No. 04-0390:

- (A) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 9) is GRANTED IN PART and DENIED IN PART; and
- (B) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 22) is GRANTED.

(13) In Fielden v. NovaStar Financial, Inc., Case No. 04-0404:

- (A) Krishnaiah Group's Motion to Consolidate, Appointment as Lead Plaintiffs and Approval of Selection of Counsel (Doc. # 4) is GRANTED IN PART

and DENIED IN PART;

- (B) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 17) is GRANTED; and
- (C) Motion of Generic Trading of Philadelphia to Approve Retroactively the Filing of Memorandum in Excess of Page Limitations (Doc. # 19) is GRANTED.

(14) In Friedman v. NovaStar Financial, Inc., Case No. 04-0425:

- (A) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 8) is GRANTED IN PART and DENIED IN PART;
- (B) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 20) is GRANTED; and
- (C) Motion of Generic Trading of Philadelphia to Approve Retroactively the Filing of Memorandum in Excess of Page Limitations (Doc. # 22) is GRANTED.

(15) In Allman v. NovaStar Financial, Inc., Case No. 04-0430:

- (A) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 5) is GRANTED IN PART and DENIED IN PART;
- (B) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 18) is GRANTED; and
- (C) Motion of Generic Trading of Philadelphia to Approve Retroactively the

Filing of Memorandum in Excess of Page Limitations (Doc. # 20) is GRANTED.

(16) In Glick v. NovaStar Financial, Inc., Case No. 04-0440:

- (A) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 5) is GRANTED IN PART and DENIED IN PART;
- (B) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 18) is GRANTED;
- (C) Motion of Generic Trading of Philadelphia to Approve Retroactively the Filing of Memorandum in Excess of Page Limitations (Doc. # 20) is GRANTED.

(17) In Donahue v. NovaStar Financial, Inc., Case No. 04-0441:

- (A) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 12) is GRANTED IN PART and DENIED IN PART;
- (B) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 26) is GRANTED; and
- (C) Motion of Generic Trading of Philadelphia to Approve Retroactively the Filing of Memorandum in Excess of Page Limitations (Doc. # 28) is GRANTED.

(18) In Bruckman v. NovaStar Financial, Inc., Case No. 04-0508:

- (A) Market Street Securities' Motion to Consolidate, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Choice of Counsel (Doc. # 4) is



GRANTED IN PART and DENIED IN PART;

- (B) Defendants' Motion to Consolidate and for Order Requiring Filing of Consolidated Complaint, Setting Date for Response to Consolidated Complaint, and Suspending Obligation to Respond to Individual Complaints (Doc. # 19) is GRANTED; and
- (C) Motion of Generic Trading of Philadelphia to Approve Retroactively the Filing of Memorandum in Excess of Page Limitations (Doc. # 21) is GRANTED.

- (19) Generic Trading and Harold and Wilma Daniels shall serve as co-lead plaintiffs;
- (20) The law firms of Entwistle & Cappucci and Milberg Weiss Bershad & Schulman, L.L.P., shall serve as lead counsel;
- (21) All subsequent papers, pleadings and motions shall be filed under the case number of the lowest numbered case, Tice v. NovaStar, No. 04-0330-CV-W-ODS, which will be re-captioned as "In re NovaStar Financial Securities Litigation";
- (22) Lead Plaintiffs shall file a Consolidated Complaint in Case No. 04-0330-CV-W-ODS on or before September 17, 2004;
- (23) Defendants shall file an Answer to the Consolidated Complaint on or before October 18, 2004;
- (24) All other pending motions in the above-captioned matters that were not specifically ruled are hereby DENIED.

IT IS SO ORDERED.

Date: August 23, 2004

/s/ Ortrie D. Smith  
ORTRIE D. SMITH, JUDGE  
UNITED STATES DISTRICT COURT